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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 313

GEORGE W. GREEN, ET AL.,
Petitioners,

vs.

CITY OF STUART, FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

THOS. B. ADAMS,
Counsel for Petitioners.

CARROLL DUNSCOMBE,
Of Counsel.

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To the Honorable the Supreme Court of the United States:

Your petitioners, George W. Green, Newport Culvert Company, a Kentucky corporation, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser, Mary M. Gosling and George W. Van Slyck, as executor of the Estate of B. N. Douglass, deceased, severally respectfully petition the court for a rehearing upon the Order and Judgment of this Honorable Court made and entered October 18th, 1943, denying their petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and

respectfully submit the following matters for the court's consideration in that behalf:

1. The effect of the denial of Writ of Certiorari in this cause is to leave in force, in Florida and throughout the jurisdiction of the Fifth Circuit, the rules of decision set forth in *Green* v. *City of Stuart,* 135 Fed. 2nd 33, thereby nullifying at least in said area the rules of decision laid down by this Court in *American Union, etc., Ins. Co.* v. *Avon Park,* 311 U. S. 158, and *Kelley* v. *Everglades Drainage District,* 87 L. Ed. (adv.) 1091.

2. In the *Avon Park* case this Court recognized the right of a creditor, no more adversely affected by the plan than these creditors Green and Newport Culvert Company, to be heard in opposition to the "plan", yet here such creditors depending upon "the same source" for payment, were completely shut out without any hearing whatsoever. Their claims and answers were entirely stricken. Under the rule announced by the Court of Appeals only a bond creditor or a judgment creditor was entitled to be heard with respect to the several aspects of the proposed "plan", whereas the Statute makes no such classification and instead classifies creditors according to the "source" of payment. If the decision of the Court of Appeals is not corrected much confusion will result in the application of the Statute not only in the Fifth Circuit but in other circuits such as the Ninth Circuit where a contrary rule has heretofore prevailed. *West Coast Life Ins. Co.* v. *Merced Irr. Dist.,* 114 Fed. 2d 654, 14th headnote.

3. The so-called fiscal agency contract granted to Thomas M. Cook, representative of R. E. Crummer & Company (R. 168 to R. 177) was equally as vicious and contrary to law, both Federal and State, as was the so-called fiscal agency contract granted to R. E. Crummer & Company in the *Avon Park* case. If neither general creditors of the

City of Stuart nor its property owners can be heard to question the illegalities of such a contract forming an integral part of the "plan" then the benefit and effect of the *Avon Park* case has been largely dissipated.

4. The interlocutory decree of September 18th, 1942, (R. 155 to R. 163) made no findings as to the ability of the City of Stuart to pay or as to what constituted its legal and available resources. Neither was any evidence submitted to the court in that behalf. Instead the court had no evidence as to any matter except two *ex parte* affidavits, one by L. B. Eurit, City Clerk (R. 150), and the other by Thomas M. Cook, the so-called fiscal agent (R. 152). In the *Kelley* case it was clearly held that the Statute made it incumbent on the court to require the submission of proper evidence as to the resources of the taxing unit and then to make appropriate findings as to such resources and ability to pay. To leave the decision of the district court and the decision of the court of appeals uncorrected on this subject will make uncertain of application the rules of law declared in the *Kelley* case not only in the Fifth Circuit but in other circuits.

5. The stricken pleadings of general creditors and property owners filed in this cause showed the existence of many evils and "fraudulent practices" which the amendment to the Bankruptcy Act of March 4th, 1940 (11 U. S. C. A., Section 403(e)) sought to forestall and prevent. If general creditors of the City and property owners of the City cannot be heard to complain of such "fraudulent practices" in proceedings brought by the City for the confirmation of such a plan as here involved then it would seem that the amendment of 1940 was in vain and that a bankruptcy court may be made the "handmaid of iniquity."

6. In *United States* v. *Bekins*, 304 U. S. 27, and in the *Avon Park* case, 311 U. S. text 149, this Court laid down

the rule that there should be no confirmation of the "plan" unless the taxing entity is "authorized by law (state law) to take all action necessary to be taken by it to carry out the plan", whereas by the petition for writ of certiorari filed in this cause and by the brief supporting the same the petitioners have pointed out how the City Charter of the City of Stuart, the State Constitution and decisions of the Supreme Court of the state demonstrate the invalidity of the bonds involved in the proposed plan. The question therefore recurs: Were general creditors of the City and its property owners entitled to be heard for the purpose of pointing out such illegalities, especially when the plan meant a new bonded indebtedness of $500,000 more than the Citizens' Committee plan previously accepted by the City Commissioners? The English Magna Carta of 1215 said:

> "To no one will We sell, to none will We deny or defer, right or justice."

The Fifth Amendment speaks the same language. We respectfully submit that the petitioners in this cause were not accorded the rights thus guaranteed.

Wherefore the petitioners respectfully request that reconsideration be given to the petition for certiorari filed in this cause and that the same be granted.

Respectfully submitted,

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